LAW REVIEW 0640
(web only, December 2006)

Returning Disabled Veteran to Work: Employers' Obligations Under USERRA

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CATEGORY: USERRA—Disabled Veteran

This article includes portions of a previous article, focused primarily on the various distinctions between the Americans with Disabilities Act and the Uniformed Services Employment and Reemployment Rights Act, first published in the Oct. 2, 2006, issue of the The National Law Journal *© 2006 ALM Properties, Inc. Those portions are reprinted here with permission from the National Law Journal. Further duplication without permission is prohibited. All rights reserved.*

According to Department of Defense statistics, more than 18,000 servicemembers have been physically injured during combat operations in Iraq and Afghanistan, and another 12,000 more have suffered serious non-combat injuries and illnesses. According to one study, about 30 percent of veterans returning from Iraq or Afghanistan have suffered from at least one type of mental health problem, including depression, anxiety, and/or post-traumatic stress disorder.

American employers are, for the first time in many decades, witnessing first hand the harsh realities of war. About 30 percent of the nearly two million service members who have been deployed to fight the War on Terror have been Reservists—Citizen Warriors called to leave their civilian jobs behind to serve extended tours of combat duty. Unfortunately, many thousands of these veterans have paid a heavy price for their nation, and are leaving the service with temporary or permanent physical or mental disabilities.

As these disabled veterans return to the workplace, they present their employers with a host of new legal challenges, primarily imposed by the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-33, a federal law that protects the rights of employees who leave their civilian jobs to serve in the uniformed services. This article addresses the various obligations that USERRA requires of an employer when an employee returns to its workplace as a disabled veteran.

The Uniformed Services Employment and Reemployment Rights Act
Congress enacted USERRA to encourage non-career service in the uniformed services by minimizing the disadvantages employees may suffer in their civilian careers when performing such service. USERRA applies to all private employers, as well as federal, state, and local governments. The act prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of those who leave their civilian jobs behind (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state National Guards (when engaged in federal functions). It also provides certain protections

regarding health care, pension, and other benefits, and it requires employers to restore returning veterans to the seniority level they would have earned had they never left their jobs to perform military service.

On Dec. 19, 2005, in response to the enormous impact of military reserve activations during recent years (the largest reserve mobilization since World War II), the U.S. Department of Labor (DOL) published new regulations to explain and clarify USERRA. The regulations are the first to interpret USERRA since its passage in 1994.

USERRA's Special Protections for Disabled Veterans

USERRA provides substantial protections to veterans who have incurred temporary or permanent disabilities (or aggravated existing disabilities) as a result of service-connected injuries or illnesses. In many ways, USERRA's protections are similar to those provided by the Americans with Disabilities Act (ADA). USERRA borrows terminology from ADA, and there is substantial overlap between the statutes. But USERRA goes beyond ADA. For one thing, USERRA applies to all employers, regardless of size, while ADA applies only to employers with at least 15 employees. More importantly, the reemployment rights provided to veterans by USERRA are far greater than those provided to other employees under the ADA.

As an initial matter, assuming the returning veteran is otherwise qualified for reemployment, he or she is entitled to be placed in what the USERRA regulations refer to as the "escalator position"—the position the veteran would have attained but for the period of military service. The "escalator" principle was first described by the U.S. Supreme Court in a 1946 case interpreting USERRA's predecessor statute. Under this principle, a returning veteran is entitled to be reemployed in the "escalator position"—the position (with commensurate seniority, status, and pay) he or she "would have attained with reasonable certainty" but for the intervening absence due to military service. For example, if an employer awards promotions based on seniority, and the returning veteran would have received a promotion had he not left for military service, then he is entitled to that promotion upon his return. In other words, a veteran must be treated as if he were riding an escalator during the period of service—when he returns, the escalator deposits him in the position he would have attained but for the absence due to military service.

At the same time, the escalator principle acknowledges that a returning veteran may return to a lower spot on the escalator if changes in the workplace during his absence would have resulted in such a consequence. For example, if a veteran's seniority would have resulted in his being laid off during the service period (e.g., as a result of a reduction in force), then he would only be entitled to be reinstated in a lay-off status.

If a veteran's disability does not limit his or her ability to perform the "escalator position," then the veteran must be reemployed in that position, and the disabling condition is irrelevant for USERRA purposes. If, however, the disabled veteran cannot immediately qualify for the escalator position, USERRA requires the employer to follow a three-part reemployment scheme in order to place the veteran in an appropriate reemployment position.

First, the employer must make "reasonable efforts" to accommodate the veteran's disability so that he or she can perform the escalator position. Second, if the disabled veteran cannot become qualified for the escalator position despite the employer's reasonable efforts to accommodate the disability, the veteran is entitled to be reemployed "in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer." Finally, if the veteran cannot become qualified to perform either the escalator position or an equivalent position, he or she must be reemployed in a position that, consistent with the circumstances of the veteran's case, is the "nearest approximation" to the equivalent position in terms of seniority, status, and pay. In its recently published USERRA regulations, the DOL emphasizes that, when searching for this alternate position, an employer must look above as well as below, since the "nearest approximation" may be a "higher or lower position, depending on the circumstances."

As with other individuals protected by USERRA, regardless of what position the veteran is eventually placed in, she is entitled to all the seniority she would have attained had she never left the workplace. In other words, even if the veteran cannot return to the "escalator" position or its equivalent, full seniority must still be accorded—even if seniority would not follow another (non-military) employee in the same circumstances. For example, in *Hembree v. Georgia Power Co.,* a disabled veteran could only qualify for a job in another division of his company. According to the collective bargaining agreement between the company and the veteran's union, a division transfer resulted in a complete loss of departmental seniority. The company reassigned the veteran, but refused to transfer his seniority because of this term in the agreement. The company also argued that providing seniority to the veteran in this scenario would place him in a better position than other employees. The Fifth Circuit Court of Appeals disagreed, holding that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."

The Veteran Must be "Qualified" for the Reemployment Position

Despite the reemployment scheme set forth above, USERRA does not require an employer to reinstate a returning veteran who, after reasonable efforts by the employer, cannot become qualified to perform any appropriate job in the workplace. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position." Qualification requires the "actual ability to perform the duties of the job according to ordinarily applicable standards of performance without unusual risk to the health and safety of himself and others."

As a guideline for determining whether a given task is "essential" for proper performance of the position, the DOL has essentially adopted the definition of "essential functions" set forth in the ADA regulations. The new USERRA regulations explain that determining whether a task is essential depends on several factors, including but are not limited to:

The employer's judgment as to which functions are essential;
Written job descriptions developed before the hiring process begins;
The amount of time on the job spent performing the function;
The consequences of not requiring the individual to perform the function;
The terms of a collective bargaining agreement;
The work experience of past incumbents in the job;

The current work experience of incumbents in similar jobs.

Ultimately, the essential tasks must be the fundamental job duties of the employment position, and not simply the marginal functions of the position, or functions simply enumerated in a job description. An employer may not decline to rehire a veteran simply because he or she cannot perform an enumerated—but nonessential—job task.

Reasonable Accommodation Efforts

To assist a disabled veteran in becoming "qualified" for an appropriate reemployment position, the employer must make "reasonable efforts" to accommodate the disability and help the veteran acquire the ability to perform the essential tasks of the position. According to DOL guidelines (and similar to guidelines under the ADA), these accommodations may include "placing the reemployed person in an alternate position, on 'light duty' status; modifying technology or equipment used in the job position; revising work practices; or shifting job functions." The type of accommodation will vary, however, depending on the nature of the veteran's disability, the requirements for properly performing the job, and other related circumstances.

An employer's "reasonable efforts" are defined as "actions, including training … that do not place an undue hardship on the employer." Here, USERRA is consistent with ADA and defines "undue hardship" as actions requiring significant difficulty or expense, when considered in light of the overall financial resources of the employer, the size of the employer in terms of employees and facilities, the nature of the employer's business operations, and other factors.

The burden is on the employer to show that the training or other accommodation efforts would impose an undue hardship on it. Of course, what may be a reasonable effort for one employer may easily constitute an undue hardship for another. Moreover, the employer's efforts must be made at no cost to the veteran. Employers should understand, however, that they can seek help from the DOL in this endeavor. Veterans are entitled to substantial vocational rehabilitation opportunities. The Veterans Administration runs several federally funded programs designed to transition disabled veterans back to the workplace. For example, the VA's Vocational Rehabilitation and Employment Program provides services and assistance to disabled veterans (including further education, vocational training, rehabilitation programs, prosthetic devices, and other adaptive devices) in order to get veterans back on the job. Further information is available at www.vba.va.gov.

May a Disabled Veteran "Bump" Another Employee Out of a Job?

What does an employer do if the only appropriate job for which the returning veteran qualifies is currently occupied by another employee? For example, Employee X was a forklift driver in a manufacturing facility before being called up with his National Guard unit to serve in Iraq. X loses a leg when his vehicle is struck by a roadside bomb. He returns to his employer, but can no longer drive a forklift. Despite the employer's reasonable efforts to accommodate him, X can only qualify for a clerk position in the front office—a position currently occupied by Z, an employee with seniority greater than X.

Quite different from what the ADA would require, USERRA contemplates that the employer may need to "bump" Z to accommodate the returning veteran. Here, Z's job is the only appropriate job for which the veteran can qualify. The DOL's recently published USERRA regulations provide that an employer "may not refuse to reemploy a returning service member [because] someone else was hired to fill [his] position during his absence, even if … reemployment might require the termination of the replacement employee" [20 C.F.R. § 1002.139(a)]. Moreover, a number of courts interpreting USERRA and its predecessor statute have concluded that certain hardships fall within contemplation of the act, including the possibility that reemployment of the veteran may compromise the rights of other employees, displace other employees, or even result in their termination. See, e.g., *Nichols v. Dep't Veteran Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993) which states "A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for non-veteran employees, those hardships fall within the contemplation of the act, which is to be construed liberally to benefit those who 'left private life to serve their country.'" *Hembree v. Georgia Power Co.,* No. 77-1775A, 1979 U.S. Dist. LEXIS 8187, at *11-12 (N.D. Ga. Dec. 4, 1979), aff'd, 637 F.2d 423 (11th Cir. 1981) held that the company was obligated to reemploy a disabled employee in "nearest approximation" to prior position "regardless of whether an opening currently existed and regardless of whether placing plaintiff in the job would … compromise rights of other employees". These courts place the burden on employers to "tailor their workforces to accommodate returning veterans' statutory rights to reemployment" *(Nichols,* 11 F.3d at 163).

Impact of Collective Bargaining Agreements

Dissimilar from the approach taken by courts under the ADA, even a collective bargaining agreement will not limit a disabled veteran's reemployment rights. In *Armstrong v. Baker,* 394 F. Supp. 1380 (N.D.W.V. 1975), a case decided under the Military Selective Service Act (MSSA), USERRA's predecessor statute, the court considered whether the plaintiff, a disabled veteran whose injuries precluded reemployment in his prior job as a railroad brakeman, was entitled to a clerical position for which he was qualified. The railroad objected that placing him in the job would necessitate laying off an employee with greater seniority who occupied the job and would thus violate the collective bargaining agreement between the railroad and the employees' union. Citing the "plain meaning" of the reemployment scheme for disabled veterans under MSSA, a scheme subsequently adopted by USERRA, the court held that reemployment was required, regardless of the consequences. The court noted that the veteran was suing "not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a Federal policy to protect those who serve in the Armed Forces." Id. at 1387 (quoting *McKinney v. Missouri-Kansas-Texas R.R.,* 357 U.S. 265, 268-69 (1958)). These "special rights" could not be "overshadowed or defeated by reference to the artificial and inflexible [collective bargaining agreement]."

Accommodating the "Temporary" Disability

In another significant departure from the ADA, which excludes from protection persons suffering only temporary conditions, USERRA's special protections apply even if the service-connected disability is not permanent. For example, if a person breaks a leg during military training, the

employer is obligated to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg is healed. In its Preamble to the new USERRA regulations, DOL states that a veteran with a temporary disability "may be entitled to interim reemployment in an alternate position [if] qualified for the position and the disability will not affect his or her ability to perform the job." The regulations also state that, "[i]f no alternate position exists, the [employee is] entitled to reinstatement under a "sick leave" or "light duty" status until he recovers. Unfortunately, the Department provides no guidance on how long an employee may be entitled to such status—presumably, the employee is entitled to such status for a reasonable period if his condition is anticipated to improve, and then the usual three-part reemployment scheme would apply.

Extension of Time in Which to Seek Reemployment

To secure their reemployment rights, veterans are normally required to report back to work within a designated time period (e.g., after a service period exceeding six months, a veteran must report back to work within 90 days). This deadline may be extended for up to two years, however, for a returning veteran who is hospitalized for or convalescing from an illness or injury incurred in or aggravated during military service.

USERRA does not specify how an employer is to verify that the veteran was actually "hospitalized for, or convalescing from" a service-connected illness or injury. But, the act does permit the employer to request documentation establishing that the veteran's application for reemployment is timely. Typically, the veteran will possess official military orders retaining him on some form of military status (e.g., "incapacitation leave") for purposes of receiving continuous care in the military health-care system. The employer should request a copy of these orders to verify that any delay in reporting back to work was the result of hospitalization or a legitimate period of convalescence. Presumably, Congress did not intend for veterans to decide on their own the amount of time they need for convalescence.

The Requirement to "Promptly" Reemploy the Veteran

When a disabled veteran returns to seek reemployment, regardless of how long he or she has been absent for military service, hospitalization, or convalescence, the employer must nevertheless act "promptly" to reemploy the veteran in an appropriate position. Courts have wrestled with the meaning of "prompt" reemployment for decades. The new USERRA regulations provide some clarification, defining "prompt" as "as soon as practicable under the circumstances." The regulations also provide that, as a general rule, "absent unusual circumstances," a veteran must be reemployed "within two weeks" of submitting an application for reemployment.

While there may be no particular challenge to promptly reemploying the typical servicemember after a brief period of service, reemploying a disabled veteran may be a complicated process and will likely require far more than two weeks. Among other things, a proper reemployment determination may require an assessment of medical records (and perhaps further physical examination) in order determine whether the veteran can perform the essential tasks of the reemployment position. Veterans suffering from mental health complications may require more in-depth analysis. Moreover, if the veteran cannot qualify for the escalator position or its

equivalent, the employer must identify the "nearest approximation" to that position (in terms of seniority, status, and pay). Further analysis may be required in order to match the veteran's physical capabilities to the essential functions of the alternate position. Finally, if the veteran will displace another employee, the employer will need to reassign or give notice of termination to that employee. The USERRA regulations recognize that some situations "may require more time" than two weeks, but it is unclear how much delay in reemployment associated with the effort to accommodate a disabled veteran will be tolerated, and equally unclear whether the veteran would be entitled to back pay and benefits during the period in which the employer struggles to meet its USERRA obligations. If light duty consistent with the veteran's limitations is available in the interim, it should be considered as an option to meet the prompt reemployment obligation while the employer searches for the most appropriate accommodation.

USERRA's Modification of FMLA Leave Requirements

Another noteworthy consideration for employers is the interplay between USERRA and the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq. In most circumstances, a disabled veteran will be eligible for up to 12 weeks of family medical leave if his or her condition constitutes a "serious health condition" as defined under the FMLA, notwithstanding the probability that the veteran has been absent for an extended period. Ordinarily, the FMLA requires an employee to have worked for the employer at least 12 months and at least 1,250 hours during the 12-month period prior to the start of an FMLA leave in order to qualify for FMLA leave. In 2002, DOL modified this general requirement for returning veterans when it published an Opinion Memorandum concluding that time spent away from work to perform military service must be counted in meeting both the 12-month and the 1,250 hour thresholds.

Employers' Defenses to Reemployment Claims by Disabled Veterans

For more than 60 years, the courts have "liberally construed" USERRA and its predecessor statutes for the benefit of servicemembers. Certainly, the reemployment scheme for disabled veterans is, for good reason, especially generous to those who have made extreme sacrifices for their nation. Nevertheless, there are circumstances when an employer is excused from reemploying a disabled veteran.

As an initial matter, any veteran seeking reemployment must first satisfy four prerequisites: (1) the veteran's cumulative length of absence, including previous service-related absences, does not exceed five years (note that some periods may be exempt under USERRA); (2) the veteran gave advance verbal or written notice of the service period; (3) the veteran seeks reemployment within the time specified by law; and (4) the veteran was not separated from service with a disqualifying discharge (e.g., dishonorable, bad conduct, or under other-than-honorable conditions). If the veteran cannot meet any one of these four prerequisites, he or she is not entitled to USERRA's reemployment protections.

The statute also sets forth three affirmative "statutory defenses" that will excuse an employer from reemploying a veteran who is otherwise eligible for reemployment benefits. In litigation, the burden is on the employer to prove the applicability of any of these defenses by a "preponderance of the evidence."

The first statutory defense is where the circumstances have changed enough to make re-employment "impossible or unreasonable." For example, the regulations describe a situation where an intervening reduction in force would have included the veteran if he had not been absent for military service. On the other hand, the need to replace a servicemember while he is absent is not a defense to reemployment. As explained earlier, USERRA requires employers to reassign or terminate replacement employees in order to accommodate veterans.

The second statutory defense is where the employer establishes that assisting the veteran in becoming qualified for reemployment would impose an "undue hardship." As explained earlier, an "undue hardship" is where the employer's efforts will require "significant difficulty or expense, when considered in light of the overall financial resources of the employer, the size of the employer in terms of employees and facilities, the nature of the employer's business operations, and other factors."

The third statutory defense provides that an employer need not reemploy a veteran whose prior employment was "for a brief, non-recurrent period, and there was no reasonable expectation that the employment would continue indefinitely or for a significant period."

In addition to the above defenses, and as explained above, USERRA recognizes the fundamental requirement that the veteran must be qualified to perform an appropriate job in the workplace. If, despite the employer's reasonable efforts, the veteran cannot become qualified for any appropriate job, then the veteran is not entitled to reemployment.

Conclusion

As military Reservists return to civilian life with physical and mental impairments in increasing numbers, it is critical for employers to understand their unique obligations to these veterans. It is especially important that employers recognize that, although there are many similarities between USERRA and the ADA, a law in which virtually all sizeable U.S. employers are now well versed, USERRA is more far reaching and provides a number of protections to injured or disabled veterans which would not be available to an employee with an identical impairment or disability who had not recently returned from military service.

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